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IN THE

Supreme Court of the United States

October Term, 1968

No. 450

HAMILTON MEMORIAL GARDENS, INC.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JACQUIN D. BIERMAN,
for Petitioner,
666 Fifth Avenue,
New York, N. Y. 10019.

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IN THE

Supreme Court of the United States

October Term, 1968

No.

HAMILTON MEMORIAL GARDENS, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on May 31. 1968.

Opinions Below

The opinion of the Court of Appeals for the Sixth Circuit is printed in Appendix B hereto, *infra,* p. 8, and is reported at — F. 2d — . The memorandum opinion of the Tax Court of the United States which is printed in Appendix B hereto, *infra,* p. 15, was not officially reported.

Jurisdiction

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on May 31, 1968, is printed in Appendix B hereto, *infra,* p. 14. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Question Presented

The sole question presented here is whether or not advance installment payments received by the petitioner from the sales of cemetery lots and grave markers are gross income as defined in Section 61(a) of the Internal Revenue Code of 1954. The government contends that such gross receipts must be considered to be gross income, and can not be reduced by the estimated cost of developing the cemetery and the estimated cost of the grave markers. The petitioner contends that all capital costs of property sold must be offset against the proceeds of sale; otherwise an unconstitutional tax on gross receipts results.

Constitutional Provisions and Statutes Involved

The constitutional provision involved is the Sixteenth Amendment. The statutory provision involved is Section 61(a) of the Internal Revenue Code of 1954; and the Regulation pertaining thereto is Section 1.61-6(a) of the Income Tax Regulations (26 C.F.R. Section 61). The pertinent portions of these materials are printed in Appendix A, *infra*, p. 7.

Statement

Petitioner operates a cemetery, and sells grave spaces and grave markers on the "pre-need method." Under this program, petitioner receives proceeds from sales of lots in advance of development of the cemetery. Funds received from customers are expended in subsequent years in building the cemetery, constructing roads, installing statuary, trees and shrubbery, and completing the various burial areas or gardens. Petitioner also receives in advance payment on account of the sale of bronze grave markers; these markers are purchased at some subsequent time when they are to be installed.

In filing its federal income tax returns, petitioner computed its gross income as the proceeds from sales less the

total cost of the property sold including estimated future costs. The government conceded that these expenditures represent cost of the property sold, but allowed them only as expended. The government thus determined that petitioner's gross income included all receipts from sales without allowance for capital costs to be expended in the future.

Petitioner contested before the Tax Court of the United States and the Court of Appeals for the Sixth Circuit the proposed increases in tax resulting from the reduced cost of property sold.

Reasons for Granting the Writ

The decision below should be reviewed because (1) it conflicts directly with principles of constitutional law established by this Court in *Burnet* v. *Logan*, 283 U.S. 404 (1931) and *Doyle* v. *Mitchell Bros. Co.*, 247 U.S. 179 (1918); (2) it involves a basic principle of federal tax law which has been applied inconsistently by the lower Courts; (3) it has far reaching application under the federal income tax law, by reason of the number of taxpayers involved and the amount of taxes involved; (4) it presents an issue which this Court should settle, in view of its opinion in *Schlude* v. *Commissioner*, 372 U.S. 128 (1963).

1. The decision of the Court below in the instant case [1] is in direct and irreconcilable conflict with the principles established by the decisions of this Court in *Burnet* v. *Logan* and *Doyle* v. *Mitchell Bros. Co.*, *supra*. These cases established that the income tax authorized by the Sixteenth Amendment to the Constitution was based upon income and

[1] The instant case and *Jefferson Memorial Gardens, Inc.* v. *Commissioner of Internal Revenue*, 390 F.2d 161 (CA 5, 1968), were consolidated for trial before the Tax Court of the United States because they involved common issues of fact and law. A single opinion was written by Judge Murdock of the Tax Court. No petition for a writ of certiorari has been filed in the *Jefferson* case and the time for filing has elapsed.

not upon capital, and that the constitutional definition of income required a complete allowance for the cost of property sold. Thus, all capital costs must first be recovered before any income can be said to exist. Where such costs are not known, they must be estimated.

In the instant case, the Court below held that this constitutional requirement that all costs of property sold be recovered before any gross income can exist was modified by the tax accounting rules which limit the accruability of an estimated deduction. Without any detailed consideration of the authorities to the contrary cited by the litigants, the Court below held that taxpayers receiving advance payments for future deliveries of property were not entitled to offset future capital costs against proceeds of sale. This conclusion was reached even though it results in the imposition of federal income tax upon gross receipts from sales of property, which the government and all Courts concerned conceded to be unconstitutional.

In reaching its conclusion, the Court below cited authorities which did not relate to the particular issue, which were not contained in the briefs filed by the parties, and which did not deal with the single important issue presented.

2. In other comparable situations, the lower Courts have agreed that all capital costs of property sold, incurred costs as well as estimates of costs to be incurred, are reductions of receipts from sales in order to obtain gross income. Thus, real estate developers reduce sales by estimated costs of development of property. *Birndeck Realty Corp.*, 25 B.T.A. 1084 (1932); *Cambrid Development Co.*, 34 B.T.A. 1155 (1936). Vendors of merchandise have had the estimated cost of completion of the product as an offset in determining gross income from the sale. *Hilinski* v. *Commissioner*, 237 F. 2d 703 (C.A. 6, 1956); *Pacific Grape Products Co.* v. *Commissioner*, 219 F. 2d 862 (C.A. 9, 1955).

On occasion, an advance payment with no offsetting capital cost to reduce it to gross income has been treated as

a deposit and excluded from the gross income computation until the costs were available for offset. *Veenstra & DeHaan Coal Co.*, 11 T.C. 964 (1948); *Woodlawn Park Cemetery Co.*, 16 T.C. 167 (1951).

Where amounts are received for an option, to be applied against the cost of property if the option is exercised, the receipt is excluded from income until it can be determined whether the property is purchased so that a recovery of the capital cost can be had. *Virginia Iron Coal & Coke Co.* v. *Commissioner*, 99 F. 2d 919 (C.A. 4, 1938), *cert. den.* 307 U.S. 630; *The Dill Co.*, 33 T.C. 196 (1959), aff'd 294 F. 2d 291 (C.A. 3, 1961).

Nevertheless, in the cemetery cases, the advance payments or deposits have been held to be gross income without any capital cost recovery allowed, and in *Hagen Advertising Displays, Inc.*, 47 T.C. 139 (1967), on appeal (6th Cir.),[2] the Tax Court held that gross receipts from the sale of merchandise was gross income without a capital recovery permitted for the cost of manufacturing. Two judges dissented.

3. The issue presented is of far-reaching importance in the administration of federal income tax laws. Every taxpayer which receives a down payment for future delivery of goods will be affected by the result in this case. The application of the principle involved is not limited to taxpayers in the cemetery business, but involves manufacturers, wholesalers and retailers. Furthermore, many other taxpayers are faced with the same question in administrative and judicial proceedings. Although the amount of tax involved in the present case is relatively small, in view of the number of taxpayers to whom the issue may apply a very substantial amount of income taxes is involved in this issue.

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[2] The case was argued before the Sixth Circuit on June 4, 1968.

4. The question presented requires the intervention of this Court. The decisions rendered in *Automobile Club of Michigan* v. *Commissioner*, 353 U.S. 180 (1957); *Schlude* v. *Commissioner*, 372 U.S. 128 (1963), aff'g and rev'g 296 F. 2d 721 (C.A. 8th, 1962); and *Brown* v. *Helvering*, 291 U.S. 193 (1934) dealt with questions of prepaid income and deductions for estimated expenses in cases other than sales of property. These decisions are inapposite in the present case because the constitutional question (the recovery of capital costs before tax may be imposed) arises only in cases of sales of property. However, in view of the pronouncements of this Court in the tax accounting area, the Courts below have been reluctant to consider the question in its broad aspect.

It is important to the uniform administration of the federal tax laws that the following questions be resolved:

1. Are advance receipts for the sale of property to be delivered in the future deposits to be excluded from the computation of gross income until the property is delivered?

2. Are such advance receipts gross income in the year received, irrespective of and unreduced by capital costs of such property?

3. Are such advance receipts to be reduced by incurred capital costs and estimated capital costs to be incurred, in order to obtain gross income?

A decision by this Court is required to answer these significant questions.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

JACQUIN D. BIERMAN

Dated: August 22, 1968

APPENDIX A

Constitutional Provisions and Statutes Involved

Constitution of the United States

AMENDMENT XVI.—INCOME TAX

The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

Internal Revenue Code of 1954

SEC. 61. GROSS INCOME DEFINED.

(a) GENERAL DEFINITION.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

* * *

(3) Gains derived from dealings in property;

* * *

APPENDIX B

Opinions and Judgment Below and Related Opinion

(Petition to Review Decision of the Tax Court of the United States)

No. 17892

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HAMILTON MEMORIAL GARDENS, INC.,
Petitioner on Review,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

Decided May 31, 1968.

Before:
EDWARDS, CELEBREZZE and COMBS, Circuit Judges.

PER CURIAM. This is a petition to review findings and judgments of the Tax Court. The parties present three questions:

I. Should the taxpayer's basis for land be limited to the transferor's basis?

At oral hearing the parties stipulated in open court that this issue, as stated above, should be remanded to the Tax Court for the taking of evidence in accordance with the procedure followed in *Jefferson Memorial Gardens, Inc.* v. *Commissioner*, — F.2d — (5th Cir. 1968) (No. 24,773,

decided January 30, 1968). The issue and holding of the Fifth Circuit case were stated as follows:

> "[T]he Commissioner argues that where securities of the issuing corporation have no readily ascertainable independent fair market value when issued, the issued stock is assigned a value equivalent to the fair market value of the assets acquired in the exchange.
>
> * * * *
>
> "No evidence was offered tending to prove the value of the certificates in question. We express no opinion whether such a value can be established, but taxpayer is entitled to that opportunity in view of the change of position on appeal, adopted by the Commissioner, which is completely dependent upon a factual determination, namely, that these certificates do not have an independently ascertainable value. We therefore remand upon this issue to afford petitioner the factual hearing to which it is entitled." *Jefferson Memorial Gardens, Inc.* v. *Commissioner*, — F.2d — (5th Cir. 1968).

As to this issue the judgment is vacated and the case is remanded to the Tax Court for the purpose indicated.

The other appellate issues may be stated as follows:

II. Can taxpayer annually exclude from gross income a portion of its annual lot sales collections as estimates of amounts to be expended in future years to develop the land sold into a cemetery?

III. Was the taxpayer in the year 1960 entitled to exclude from gross income as the accrued cost of grave markers sold the amount of estimated future expenditures it may have to make to purchase markers?

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The factual background of, and the holding on, these two issues are set forth in the opinion of the Tax Court in this case:

Land Development

"The Commissioner in his brief states:

"'Petitioners Jefferson Memorial Gardens, Inc. and Hamilton Memorial Gardens, Inc. determined that 15 percent of the base sales price of cemetery lots sold was a reasonable estimate of its development and improvement costs, and such petitioners accrued as a deduction for cost of cemetery lots sold 15 percent of all lots sales collections in each taxable year. The respondent disallowed such petitioners' claimed deductions for development and improvement costs in the taxable years in issue because such deductions were in reality reserves for estimated expenses, and the respondent determined that petitioners' actual development expenditures for each taxable year in issue should be allocated as an addition to petitioners' cost basis of its unsold cemetery lots at the beginning of each such taxable year in computing gain from the cemetery lots sold during such taxable years.'

"The petitioners have failed to show that the Commissioner erred in his treatment of costs of developments and improvements and, except as conceded by the Commissioner, his allowance of such costs will not be disturbed. In *Sherwood Memorial Gardens, Inc., supra,* [42 T.C. 211, *aff'd,* 350 F.2d 225 (7th Cir. 1965)] and *Memphis Memorial Park,* 28 B.T.A. 1037, *aff'd per curiam,* 84 F.2d 1008, similar contentions of the petitioners were dismissed and rejected on similar factual bases."

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Grave Marker Cost

"Hamilton has the burden of proof on this issue and it has failed to show that the Commissioner erred. The stipulated facts show that Hamilton not only had not bought any markers during 1960 to fill pre-need contracts but it had not contracted to buy any; it had not installed any of the combined granite and bronze markers; it had installed only 7 bronze markers under unexplained circumstances; it had no obligation to install any markers until the purchaser had paid the price in full and had requested installation; and all payments by purchasers were to be spread over a period of years. The amounts accrued which it seeks to deduct, were based upon 1960 prices which might or might not be in effect later when it would purchase markers. No part of any collections on the installment contracts for markers was placed in trust for the purchase of markers.

"The estimated future costs of markers are not deductible in 1960."

In relation to both of these categories we are dealing with anticipated future expenditures. They were not expended in the tax year in question. Nor were they irrevocably allocated to any reserve for use solely for said purposes. Further, it is clear that both categories of expenditures are uncertain as to amount and indefinite as to time of expenditure. In at least the circumstances of the lot purchaser's default, the expenditures would not necessarily be made at all.

This court has provided a formula which the taxpayer could have employed had it seen fit to treat these moneys as presently determinable "capital costs." In *Mount*

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Vernon Gardens, Inc. v. *Commissioner,* 298 F.2d 712, 718 (6th Cir. 1962), this court said:

> "The estimated cost of the improvements has been given, the correctness and reasonableness of which has not been challenged. In so far as the taxpayer is concerned, these funds have been impressed with an irrevocable trust to be used for such improvements and will never revert to the taxpayer. It is more than a contingent liability or a liability to accrue in the future. The taxpayer has legally parted with these funds, the amount is definitely fixed. The fact that the exact manner in which the money will be spent has not been decided upon does not, in our opinion, alter the fact that the taxpayer has become legally and irretrievably bound for improvement expenses of the nature agreed upon and in a definitely fixed amount."

See also *Commissioner* v. *Cedar Park Cemetery Ass'n,* 183 F.2d 553 (7th Cir. 1950).

No such irrevocable allocation has been made here.

In short, we believe that taxpayer herein is attempting to have its cake and eat it too. It cannot both keep these moneys available for general uses of the corporation and claim at the same time that they have been paid as or finally allocated to capital costs.

Dealing with identical issues, the Fifth Circuit said:

> "No dedicated and uninvadable development fund was established. Thus we inescapably must find that petitioner had the unfettered right to use these funds as it desired upon receipt. The funds excluded from gross income by petitioner in its tax returns actually were gross income to it. Consequently, the Commissioner's deficiency assessment will be affirmed." *Jefferson Memorial Gardens, Inc.* v. *Commissioner,* — F.2d — (5th Cir. 1968).

See also *Sherwood Memorial Gardens, Inc.* v. *Commissioner*, 350 F.2d 225 (7th Cir. 1965).

We agree.

The facts of this case which we have recited seem to us to remove any basis for the argument that this is an unconstitutional tax on gross receipts. The taxpayer's proposed accounting does not clearly reflect income. *Cf. Schlude* v. *Commissioner*, 372 U.S. 128 (1963); *American Automobile Ass'n* v. *United States*, 367 U.S. 687 (1961); *Commissioner* v. *Milwaukee & Suburban Transport Corp.*, 367 U.S. 906 (1961); *vacating*, 283 F.2d 279 (7th Cir. 1960), *and remanding.*

As to the second and third issues, the opinion of the Tax Court is affirmed.

As to the first issue, the judgment is vacated and the case is remanded to the Tax Court for further proceedings in accordance with this opinion.

Appendix B

(Judgment)

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 17,892

HAMILTON MEMORIAL GARDENS, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Before:
EDWARDS, CELEBREZZE and COMBS, Circuit Judges.

On Petition to Review a decision of the Tax Court of the United States.

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the decision of the said Tax Court in this cause be and the same is hereby affirmed as to the second and third issues; as to the first issue, the judgment is vacated and the case remanded to the Tax Court for further proceedings consistent with the opinion.

No costs awarded. Rule 23(4).

Entered by order of the Court.

CARL W. REUSS,
Clerk.

Appendix B

(Opinion)

T.C. Memo 1966–50

TAX COURT OF THE UNITED STATES

JEFFERSON MEMORIAL GARDENS, ET AL.,[1]
Petitioners,

—v.—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket Nos. 95320, 1705–63, 282–62

March 11, 1966.

JACQUIN D. BIERMAN, for the petitioners.
RUDOLPH J. KORBEL and JACK OLDER, for the respondent.

MEMORANDUM OPINION

MURDOCK, *Judge*: The Commissioner determined deficiencies in income tax as follows:

Year	Jefferson Memorial Gardens, Inc.	Hamilton Memorial Gardens, Inc.	Tyler Mountain Memory Gardens, Inc. F/Y Ended Sept. 30
1956			$14,975.67
1957	$66,325.95		10,382.33
1958	46,458.35	$39,802.32	6,062.04
1959	33,553.99	14,384.39	4,898.47
1960		4,950.13	3,823.85

[1] Proceedings of the following petitioners are consolidated herewith; Hamilton Memorial Gardens, Inc., Docket No. 1705-63 and Tyler Mountain Memory Gardens, Inc., Docket No. 282-62.

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The only issues for decision are whether the Commissioner erred in:

1. Disallowing as cost of lots sold in each year the amounts accrued in that year as due to holders of "certificates of indebtedness,"

2. Disallowing in each year amounts claimed as costs of improvements to the cemetery property,

3. Disallowing cost of grave markers contracted to be sold by Hamilton in 1960.

• • •

(MATERIAL OMITTED RELATES TO OTHER ISSUES)

Hamilton Memorial Gardens, Inc., hereafter called Hamilton, is a Tennessee corporation incorporated on April 24, 1953, operating for profit a cemetery near Chattanooga. Its returns were filed with the district director at Nashville.

• • •

All three petitioners sell and report income from sales of burial spaces and markers on the installment method. Otherwise all three use an accrual method of accounting.

• • •

The Commissioner, in determining the deficiencies against Hamilton, disallowed deductions "claimed for Developments and Improvements Accrued • • • for the reason that all the required conditions for the allowance of this accrual have not been met" and "accordingly" he increased taxable income by $24,891.75 for 1958, $18,359.41 for 1959 and $7,532.47 for 1960.

It is not clear, from the notice of deficiencies attached to the petition in the Jefferson case, what the Commissioner did with respect to amounts accrued for develop-

ments and improvements by Jefferson but it is alleged in the petition that he erred "by disallowing the cost of improvements to property sold" in a stated amount for each year. The Commissioner concedes in his brief with respect to Jefferson "that in redetermining the amount of development costs deductible by petitioner as cost of cemetery lots sold, it was improper to reduce actual development expenditures for the taxable year 1957 by the amount of development costs accrued by petitioner in the taxable years 1953, 1954, 1955 and 1956 in excess of actual expenditures in such years."

The Commissioner in his brief states:

> Petitioners Jefferson Memorial Gardens, Inc. and Hamilton Memorial Gardens, Inc. determined that 15 percent of the base sales price of cemetery lots sold was a reasonable estimate of its development and improvement costs, and such petitioners accrued as a deduction for cost of cemetery lots sold 15 percent of all lots sales collections in each taxable year. The respondent disallowed such petitioners' claimed deductions for development and improvement costs in the taxable years in issue because such deductions were in reality reserves for estimated expenses, and the respondent determined that petitioners' actual development expenditures for each taxable year in issue should be allocated as an addition to petitioners' cost basis of its unsold cemetery lots at the beginning of each such taxable year in computing gain from the cemetery lots sold during such taxable years.

The petitioners have failed to show that the Commissioner erred in his treatment of costs of developments and improvements and, except as conceded by the Commissioner, his allowance of such costs will not be disturbed. In *Sher-*

wood Memorial Gardens, Inc., supra, and *Memphis Memorial Park*, 28 B.T.A. 1037, affd. per curiam 84 F.2d 1008, similar contentions of the petitioners were dismissed and rejected on similar factual bases.

• • •

Hamilton initiated two types of installment sales of markers on a pre-need basis in January 1960. In one the markers consisted of a granite base carrying a bronze plate. They were all alike except for the inscription on the plate. The other was a marker of bronze only. Hamilton had no outstanding contracts in 1960 to purchase granite or bronze for such markers and it installed no such granite and bronze markers in 1960. It claimed on its 1960 return a deduction of $3,290.32 [2] for cost of granite and bronze markers. Hamilton installed only 7 bronze markers in 1960 at a total cost of $743. It claimed on its 1960 return a deduction of $6,008.83 [2] as cost of bronze sold under pre-need contracts.

The Commissioner, in determining the deficiencies for 1960 against Hamilton, explained:

> The deduction of $9,434.33 for liability for Purchase of Markers Accrued has been disallowed for the reason that it is an estimated expense reserve which is not an allowable deduction.

Hamilton assigned this action as error.

Hamilton has the burden of proof on this issue and it has failed to show that the Commissioner erred. The stipulated facts show that Hamilton not only had not bought any markers during 1960 to fill pre-need contracts but it had not contracted to buy any; it had not installed any of the combined granite and bronze markers; it had installed only 7 bronze markers under unexplained circumstances;

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[2] There is a small unexplained discrepancy between the amount disallowed by the Commissioner and the two amounts stipulated to have been claimed as deductions on the return.

it had no obligation to install any markers until the purchaser had paid the price in full and had requested installation; and all payments by purchasers were to be spread over a period of years. The amounts accrued which it seeks to deduct, were based upon 1960 prices which might or might not be in effect later when it would purchase markers. No part of any collections on the installment contracts for markers was placed in trust for the purchase of markers.

The estimated future costs of markers are not deductible in 1960.

The notice of deficiencies in the Jefferson case contains no reference to costs of markers. Jefferson's pleadings contain no reference to markers or costs of markers. No such reference is made in the answers in that case. Thus the pleadings in that case do not raise any issue with respect to markers or the cost thereof. Nevertheless the stipulation of facts in that case includes statements relating to contracts for the installment sale of markers and the parties argue this point in their briefs.

Jefferson initiated two types of installment sales of markers in December 1958. One type was of a granite and bronze marker. All such markers were identical except for the inscription. The other type was bronze only. Jefferson had no outstanding contracts during 1958 and 1959 to purchase and it did not purchase granite or bronze for markers sold on these contracts. No markers were installed under either type of contract until the contract was fully paid and the purchaser had requested installation. In case of default in payment by the purchaser no marker would be installed. None was installed during 1958 or 1959 and no deduction for cost of markers was claimed on the return for 1958 attributable to installment collections during that year. The collections were reported on the installment method. Jefferson claimed a deduction of $35,328.09 on its 1959 return as the estimated cost of

bronze related to collections on pre-need installment contracts for bronze markers. It is stipulated that the Commissioner erroneously treated this amount as a perpetual care item and that his action should be treated as a disallowance of an estimated cost of bronze markers related to 1959 collections. The Commissioner regards the liability of Jefferson on markers during 1958 and 1959 as not sufficiently precise to justify an accrual of their future cost.

Jefferson is certainly in no better situation in this connection than is Hamilton and has not proved that it is entitled to any deduction for cost of markers under its installment sales contracts.

Decision will be entered under Rule 50.

Appendix B

(Opinion of United States Court of Appeals for the Fifth Circuit, Reviewing Decision of Tax Court)

IN THE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 24,773

JEFFERSON MEMORIAL GARDENS, INC.,
Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION TO REVIEW DECISION OF THE TAX COURT OF THE UNITED STATES

JACQUIN D. BIERMAN, Chase & Bierman, 666 Fifth Ave., New York, N. Y., Atty., for Petitioner.

LESTER R. URETZ, Chief Counsel, IRS, Wash., D.C., RICHARD P. MILLOY, Atty., IRS, Wash., MITCHELL ROGOVIN, Asst. Atty. Gen., LEE A. JACKSON, JONATHAN S. COHEN, WILLY NORDWIND, JR., U.S. Attys, Tax Div., Dept. of Justice, Wash., D.C. for Respondent.

Petition for Review of Decision of the Tax Court of the United States (Alabama Case)

Before

COLEMAN and SIMPSON, *Circuit Judges*, and DAWKINS, *District Judge*.

Appendix B

DAWKINS, *District Judge*:

Presented here is a petition for review of a decision of the Tax Court upholding income tax deficiency assessments against Jefferson Memorial Gardens, Inc. (hereinafter petitioner or taxpayer) for the year 1957, 1958, and 1959. There are two questions for decision: first, whether petitioner is entitled to a higher acqusition basis on certain real estate acquired by it for use in the cemetery business; and second, whether petitioner is entitled to exclude from its gross income certain installment receipts representing partial satisfaction of the sales prices of grave spaces and grave markers. The facts are not in controversy, having been stipulated by the parties.

• • •

As part of its business activities, petitioner sold grave spaces and grave markers on a "pre-need" basis whereby customers would purchase spaces and/or markers on a "pay now—use later" plan. As each grave space sales contract was executed, petitioner would exclude 15% of the sales price from its gross income, this being treated as a portion of the cost of goods sold. The figure of 15% was designated in the sales contracts for future use in cemetery development. As each grave marker contract was executed, petitioner would deduct the manufacturer's list price for that type of marker on its income tax return for the year in question, again as a part of costs of goods sold. In other words, petitioner was making these exclusions from income prior to incurring actual expenditure of the designated funds.[5]

It was petitioner's contention that this method of accounting was the best method actually to match revenues with costs. The Commissioner disagreed, and refused to

[5] Some of the problems encountered in this area have been recently discussed. See Aland, Prepaid Income and Estimated Future Expenses: Is a Legislative Solution Needed? 54 A.B.A.J. 84 (1968).

allow these exclusions until the anticipated expenditures actually were incurred. This position was affirmed by the Tax Court. (That Court's decisions are not officially reported.) Having the facts before us, we move to the merits of the issues presented for decision.

* * *

EXCLUDABILITY OF RECEIPTS FROM GROSS INCOME

On this point petitioner, in essence, contends that certain amounts received from sales of grave spaces and markers are excludable from gross income because such receipts represent a return of capital investment and are not subject to income tax. To support its position, petitioner has cited a wealth of constitutional landmarks holding that the government constitutionally may not levy an income tax on gross receipts but must limit its tax so as to affect only gross income.[11] We are certain that no one, including the Commissioner, disagrees with this well-established principle of law. Nevertheless, the more difficult task confronting us here is an initial determination of whether these receipts represent income or a return of capital as contended by petitioner.

It asserts that in the sales contracts for the grave spaces, it covenanted to dedicate 15% of the sales price of each plot to *future* cemetery development. Moreover, petitioner points out that these receipts were so allocated in its bookkeeping entries. It also had exhaustive engineering studies made prior to construction which included estimated costs of developing the cemetery. The correctness of these estimated costs is unchallenged.

Also to be considered is the fact that properly documented estimated expenditures are excludable in ordinary real estate developments every day and courts consistently

[11] Brief for the Petitioner, pp. 15-16.

have applied these principles to the cemetery business. Prior to decision of this important issue, we recognize the following basic principles.

It consistently had been held that properly estimated costs of improvements to subdivided real estate is a capital expenditure allocable to the basis of the various unsold lots to be recovered by the developer upon his ultimate sale of the lots.[12] It also has been held that this principle is applicable to a tract of land developed for cemetery purposes and the sale of burial lots therein.[13] However, without exception, it has been the long-standing rule that where a fund is established by attributing a percentage of the sales price of cemetery lots, and the fund is to be devoted to future development and improvement, the amounts going into the fund will constitute gross income to the cemetery developer.[14] There are two recognized exceptions to this rule: first, where there is a definitely established trust for the development fund;[15] and second, where a segregated fund is required, under a specific agreement with the lot

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[12] Willow Terrace Development Co. v. C.I.R., 345 F.2d 933 [15 AFTR 2d 1108] (5th Cir. 1965); C.I.R. v. Laguna Land & Water Co., 118 F.2d 112 [26 AFTR 632] (9th Cir. 1941); Butler-Fornari Realty Corp. v. C.I.R., 37 B.T.A. 933 (1938); Cambria Development Co. v. C.I.R., 34 B.T.A. 1155 (1936); Birdneck Realty Corp. v. C.I.R., 25 B.T.A. 1084 (1932).

[13] Mount Vernon Gardens, Inc., v. C.I.R., 298 F.2d 712 [9 AFTR 2d 667] (6th Cir. 1962); C.I.R. v. Cedar Park Cemetery Assn., 183 F.2d 553 [39 AFTR 77] (7th Cir. 1950).

[14] Sherwood Memorial Gardens v. C.I.R., 350 F.2d 225 [16 AFTR 2d 5111] (7th Cir. 1965); Mount Vernon Gardens, Inc. v. C.I.R., 298 F.2d 712 [9 AFTR 2d 667] (6th Cir. 1962); Gracelawn Memorial Park, Inc. v. United States, 260 F.2d 328 [2 AFTR 2d 6058] (3d Cir. 1958); National Memorial Park v. C.I.R., 145 F.2d 1008 [33 AFTR 157] (4th Cir. 1944); American Cemetery Co. v. United States, 28 F.2d 918 [7 AFTR 8258] (D.C. Kan. 1928).

[15] See Mount Vernon Gardens, Inc. and Cedar Park, supra.

purchasers, which actually binds the developer to make specific improvements.[16]

Proper interpretation and application of the trust fund exception has been astutely articulated by our brothers of the Sixth Circuit in Mount Vernon Gardens, Inc. v. C.I.R., supra, as follows:

> "As [prior] opinions . . . point out, the decisive feature in each case is the terms and provisions of the particular trust involved. *The questions of control by, and inurement to the benefit of, the taxpayer, are of prime importance.*" (298, F2d 712, 716 [9 AFTR 2d 667] Emphasis added.)

A similar position was adopted earlier by this Court in Metairie Cemetery Association v. U.S., supra, where we held:

> "A cemetery association may exclude from income deposits paid to it by burial lot owners, *if it can show that the deposits are received in trust and that the principal and income therefrom cannot inure to its benefit.*" (282 F.2d 225, 229, 230 [6 AFTR 2d 5326]. Emphasis added.)

Regardless of establishment of a formal trust fund, the same principles are applicable to a case, as in the second exception to the general rule, where a segregated and protected development fund is specifically required. From authorities cited above, the validity of petitioner's claim on this issue turns upon whether such funds, received from advance sales of grave spaces and markers, and excluded

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[16] Monte Vista Burial Park, Inc. v. United States, 340 F.2d 595 [15 AFTR 2d 265] (6th Cir. 1965); Metairie Cemetery Ass'n v. United States, 282 F.2d 225 [6 AFTR 2d 5326] (5th Cir. 1960); C.I.R. v. Cedar Park Cemetery Ass'n, 183 F.2d 553 [39 AFTR 771] (7th Cir. 1950).

from gross income, actually were managed in such manner that the use thereof could not inure to petitioner's benefit. Because petitioner did not establish a trust for future development here, it must prove that a specific agreement existed with burial lot owners to establish a development fund is specifically required. From the authorities cited above, the validity of petitioner's claim on this issue turns upon whether such funds, received from advance sales of grave spaces and markers, and excluded from gross income, actually were managed in such manner that the use thereof could not inure to petitioner's benefit. Because petitioner did not establish a trust for future development here, it must prove that a specific agreement existed with burial lot owners to establish a development fund. Moreover, petitioner must show that this fund was for the benefit of the burial lot purchasers and not for petitioner's unrestricted use.

Here, the evidence clearly shows that petitioner had very complete detailed engineering studies conducted which accurately reflected the estimated costs of developing the cemetery in question. In addition it has been established that sales contracts executed by taxpayer with plot purchasers contained a development clause reading:

> "(3) Development: To expend for general improvements and development, including the building of Gardens, a sum equal to not less than fifteen per cent (15%) of the above purchase price, provided such sum, together with a like amount of all previous plot sales made by the Company, shall not already have been expended for such purposes subsequent to December 1, 1952." (See Exhibit 15-O).

Contrariwise, there is no evidence that these funds were received for the exclusive benefit of the burial lot owners or that there was a development fund of any kind estab-

lished. Indeed, the most that can be said in petitioner's favor regarding this is that a mere bookkeeping entry was made to the effect that certain amounts were to be used in development of the cemetery. No dedicated and uninvadable development fund was established. Thus we inescapably must find that petitioner had the unfettered right to use these funds as it desired upon receipt. The funds excluded from gross income by petitioner in its tax returns actually were gross income to it. Consequently, the Commissioner's deficiency assessment will be affirmed.

We are convinced that this case is squarely governed by the recent decision in Sherwood Memorial Gardens v. C.I.R. supra, which involved identical legal issues and at least one of the same parties. In Sherwood, a future development provision almost a twin to the clause in this case was contained in each burial lot sales contract. Regarding such a provision, the court in Sherwood held:

> "Petitioner was obligated by the First Agreement only to deposit the designated sums in a separate bank account and to use the funds thus deposited for no other purpose than development of the cemetery. At best this provision created merely a contractual obligation, not a trust. But even if the agreement were a trust in form, where, as here, petitioner has wide discretion in use of the fund, with no definite obligation to make any particular improvements and with no necessary relationship between the amount of the fund and the development costs and the fund was not for care of individual lots, petitioner was the primary beneficiary of the fund and it could not properly exclude that amount of the fund from its gross income." (350 F.2d 225, 230 [16 AFTR 2d 5111].)

As here, the taxpayer in Sherwood urged that its obligation to use these funds was definite and flowed from the

engineering study made of the cemetery. The court found no indication that any of the purchasers knew or were informed of the plans, and no evidence was put forth that petitioner was not free to alter the plans at will. We must reach the same conclusion.

As noted, there is little if any distinction between Sherwood and the case we now have before us. It is obvious that petitioner had the unrestricted right to use all funds received from burial lot purchasers and had no obligation to make specific improvements at any specific time. With reference to the grave markers, no purchase was necessary until final payment of the purchase price was tendered or a death occurred. These circumstances compel us to hold that petitioner was not entitled to exclude these amounts from gross income.

Because of petitioner's persistence in urging that it has been taxed unconstitutionally, it becomes necessary briefly to dispose of this argument. Taxpayer urges that the analogy already discussed relative to real estate development is applicable. Suffice it to say that in the real estate cases, where exclusions for estimated development costs have been allowed, it was clearly established that specific improvements either were required by law or actually were made. These improvements included such items as streets, drives, sewer disposal systems and extension of gas and electric service lines. We should note that, if exclusions were taken for these items by taxpayers, that the expenditures thereafter *had not been made*, the Commissioner undoubtedly would have asserted a deficiency against those taxpayers as was done here.

Recently, in Willow Terrace Development Co. v. C. I. R., supra, this court allowed a taxpayer to allocate the cost of a water and sewerage system to the cost of homes in a newly developed subdivision. However, we noted that the test to be made was set forth in Estate of Collins v. C. I. R., 31 T.C. 238 (1958):

Appendix B

> "'. . . We have concluded that petitioners constructed the sewerage system not only for the basic purpose but for the sole purpose of inducing and making possible the sale of lots . . ., that they did not retain full ownership and control of the sewerage system, and that they parted with material property rights therein for the benefit of the subdivision lots.'" (345 F.2d 933, 938, 939 [15 AFTR 2d 1108].)

As indicated by the test set forth in Collins, and indeed in all authorities noted, for an exclusion of estimated costs to be permitted, the funds must not only be held for the benefit of someone other than the taxpayer, but must also actually be used to that end. Here neither of these requirements has been met, and, accordingly, petitioner's argument that it has been unconstitutionally taxed upon gross receipts, instead of upon gross income, is without merit.

For the foregoing reasons and upon the basis of the authorities cited, the decision of the Tax Court is In Part Reserved and Remanded, and in Part Is Affirmed.

Certificate of Service

I, a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of August, 1968, I served a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on the Respondent herein, by delivering a copy of the same to the Solicitor General, Department of Justice, Washington, D. C. and to Mitchell Rogovin, Assistant Attorney General and Willy Nordwind, Jr., Attorney of record for Respondent in the Court below, Department of Justice, Washington, D. C.

JACQUIN D. BIERMAN,
Member of the Bar of the Supreme
Court of the United States.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 450

HAMILTON MEMORIAL GARDENS, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner is a cemetery association which sells grave spaces and markers on a prepaid plan whereby it receives advance cash payments free of any restriction on the time or manner of their use. Petitioner deducted from these prepaid amounts estimated expenses of cemetery development and grave markers in computing its gross income for federal tax purposes. The Commissioner treated the prepayments as gross income in the year received, and allowed deduction of the development and marker expenses in the years in which they were actually expended. The Commissioner's treatment of the prepayments was sustained by the Tax Court and the court of appeals. That decision is correct; it does not conflict but

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rather is in accord with the decisions of this Court and the other courts of appeals. There is no ground for further review.

1. Contrary to petitioner's assertions (Pet. 3–4), there is no conflict with this Court's decisions in *Doyle* v. *Mitchell Brothers Co.*, 247 U.S. 179, and *Burnet* v. *Logan*, 283 U.S. 404. *Doyle* v. *Mitchell Brothers Co.* holds that the federal income tax is imposed upon net, or taxable, income, rather than upon gross receipts. 247 U.S. at 184–185. *Burnet* v. *Logan* holds that in a transaction where property was sold with the sales price to be paid on a contingent basis in future years, and the obligation to pay could not be reduced to the present equivalent of cash, the taxpayer could defer reporting gain on the "open" sale until she had recovered her capital investment in the property transferred. 283 U.S. at 413.

There has been no tax here on petitioner's gross receipts; petitioner will be allowed to deduct its costs of development and supplying grave markers as and when they are incurred. These prepaid amounts were entirely at taxpayer's disposal for current use; they were not held in a specially established trust, or otherwise untouchable form—factors that would have justified the treatment for which petitioner contends.[1]

Petitioner's reliance on those two cases confuses the question of *what* income is taxable with that of *when* income becomes taxable. This case, of course, involves only the latter issue. In holding that the advance pay-

[1] Cf. *Monte Vista Burial Park, Inc.* v. *United States*, 340 F. 2d 595 (C.A. 6); *Mount Vernon Gardens, Inc.* v. *Commissioner*, 298 F. 2d 712, 716 (C.A. 6).

ments were taxable when received, the court below correctly applied the rule that money received without restriction is income when received, notwithstanding the fact that later expenditures of that income will generate deductible business expenses. This doctrine has been established by a long line of cases, including *Schlude* v. *Commissioner*, 372 U.S. 128; *American Automobile Assn.* v. *United States*, 367 U.S. 687; *Commissioner* v. *Hansen*, 360 U.S. 446; *Security Mills Co.* v. *Commissioner*, 321 U.S. 281; *Brown* v. *Helvering*, 291 U.S. 193; *North American Oil* v. *Burnet*, 286 U.S. 417; *Burnet* v. *Sanford & Brooks Co.*, 282 U.S. 359.

Most recently, the Fifth Circuit, in *Jefferson Memorial Garden, Inc.* v. *Commissioner*, 390 F. 2d 161, reaffirmed this doctrine in a cemetery association case involving essentially the same issue as that raised here, *i.e.*, the excludability of prepayments for grave spaces and markers. In holding the prepayments taxable when received, the court in *Jefferson Memorial Gardens, Inc., supra*, followed the Seventh Circuit's decision on the same point in *Sherwood Memorial Gardens* v. *Commissioner*, 350 F. 2d 225, and rejected the very constitutional contentions advanced here. In short, there has been consistent and uniform application by the lower courts of the doctrine of taxability of unrestricted prepaid receipts.

2. There is no merit to petitioner's assertion that the annual accounting principle enunciated in *Schlude* and *American Automobile Assn.* is inapplicable because those cases involved prepayment for services

rather than goods. This purported distinction has been rejected by the Fifth Circuit in *Jefferson Memorial Gardens, Inc., supra,* by the Seventh Circuit in *Consolidated-Hammer Dry Plate & Film Co.* v. *Commissioner,* 317 F. 2d 829, 833, and by several decisions of the Tax Court.[5]

Congress too has rejected this distinction and confirmed the Commissioner's position here. When the short-lived Section 452 was enacted in the 1954 Code,[6] Congress allowed deferral of prepaid income where money was received in connection with an obligation to furnish goods or services which extended beyond the close of the tax year in which the prepayments were received. The Senate Finance Committee Report on Section 452 noted (S. Rep. No. 1622, 83d Cong., 2d Sess., p. 301):

> Under the 1939 Code, regardless of the method of accounting, with minor exceptions established by regulations or administrative practice, amounts are includible in gross income by the recipient not later than the time of receipt if they are subject to free and unrestricted use by the taxpayer even though the payments are for *goods or services* to be provided by the taxpayer at a future time. * * * [Emphasis supplied.]

The repeal of Section 452, by its terms applicable to both goods and services, reinstated the law as it had

[5] See, *e.g.*, *Hagen Advertising Displays, Inc.* v. *Commissioner*, 47 T.C. 139, appeal pending (C.A. 6) (prepaid custom-built advertising signs); *Farrara* v. *Commissioner*, 44 T.C. 189 (prepaid clothing); and *Krim-Ko Corp.* v. *Commissioner*, 16 T.C. 31 (prepayments for advertising services and materials).

[6] Section 452 was repealed, retroactively, in 1955. Section 1 Act of June 15, 1955, c. 143, 69 Stat. 134.

been under the 1939 Code and as it is today. *Schlude* v. *Commissioner, supra,* 372 U.S. at 134–135. Congress has explicitly rejected petitioner's approach except in two very limited areas: prepaid subscriptions to periodicals, governed by Section 455, enacted in 1958,[4] and prepaid dues of certain membership organizations, covered by Section 456, enacted in 1961.[5]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.
LOUIS M. KAUDER,
JONATHAN S. COHEN,
Attorneys.

SEPTEMBER 1968.

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[4] Section 28(a), Technical Amendments Act of 1958, P.L. 85–866, 72 Stat. 1606, 1625.

[5] Section 1, Act of July 26, 1961, P.L. 87–109, 75 Stat. 222.

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Attorney for Petitioner

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IN THE

Supreme Court of the United States

October Term, 1968

No. 450

HAMILTON MEMORIAL GARDENS, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO MEMORANDUM IN OPPOSITION

JACQUIN D. BIERMAN
Attorney for Petitioner
666 Fifth Avenue
New York, N. Y.

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IN THE

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HAMILTON MEMORIAL GARDENS, INC.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO MEMORANDUM IN OPPOSITION

Respondent has submitted a memorandum in opposition to the granting of the writ, in which he raises certain new points.

Respondent's position is that the case only involves a question of timing, *i.e.*, when income is taxable, as opposed to the issue of whether income has been received. This viewpoint demonstrates particularly the necessity for granting the writ of certiorari.

The question here is not a question of timing the petitioner's gross income, *but rather whether petitioner has received any gross income at all.* Petitioner submits that until it is permitted to absorb its capital costs, incurred or estimated, constitutionally it has no gross income which may be taxed.

None of the cases cited by respondent to characterize the issue as one of timing, rather than of substantive gross

income, is pertinent.[1] None involves the determination of gross income; they all deal with expense deductions. None deals with the offset of capital costs against gross receipts. Because the receipts in the tax accounting cases cited by respondent were from services, dues, or interest, there was no question as to the recovery of capital investment. No problem was presented of a tax on gross receipts (the receipts were gross income because no cost of goods sold was involved). The instant constitutional issue was not presented in any of those cases.

This is the first case in which the two principles, tax accounting *vs.* constitutional law, have conflicted. In the past, the Tax Court has held and Commissioner has conceded that the constitutional principle took precedence over accounting rules. *Veenstra & DeHaan Coal Co.* v. *Commissioner,* 11 T.C. 964 (Acquiescence 1949-1 Cumulative Bulletin 4); *Woodlawn Park Cemetery Co.* v. *Commissioner,* 16 T.C. 1067 (Acquiescence 1951-2 Cumulative Bulletin 4).[2] The recent decision of the Tax Court in *Hagen Advertising Displays, Inc.* v. *Commissioner,* 47 T.C. 139, appeal pending (CA.6) contains a full discussion of the issue only in the dissenting opinion. Even now, respondent concedes at page 2 of his Memorandum that there can be no tax on gross receipts.[3]

Respondent argues that the constitutional issue is avoided by allowing an offset for costs in the future. Obviously, this does not meet the established principle that cost must be recovered *first,* and that gross income exists only

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[1] *Schlude* v. *Commissioner,* 372 U.S. 128; *American Automobile Assn.* v. *United States,* 367 U.S. 687; *Commissioner* v. *Hansen,* 360 U.S. 446; *Security Mills Co.* v. *Commissioner,* 321, U.S. 281; *Brown* v. *Helvering,* 291 U.S. 193; *North American Oil* v. *Burnet,* 286 U.S. 417; *Burnet* v. *Sanford & Brooks Co.,* 282 U.S. 359; *Sherwood Memorial Gardens* v. *Commissioner,* 350 F.2d 225.

[2] *Farrara* v. *Commissioner,* 44 T.C. 189, and *Krim-Ko Corp.* v. *Commissioner,* 16 T.C. 31, did not involve the constitutional question because it was not raised by the taxpayers.

[3] See also Income Tax Regulations, §§ 1.61-3(a), 1.61-6(a).

to the extent that proceeds of sale exceed cost. Furthermore, a subsequent cost allowance is not equivalent to a current offset because future gross income might not be adequate to absorb the future expenditure for present costs.[4]

Whether the prepaid receipts for grave spaces and markers were held without restriction is irrelevant. Only that portion of them representing *income* could be taxed.

Respondent erroneously characterizes the expenditures required in the future as "business expenses." They were not expenses; they were capital costs. While estimated business expenses might not be deductible currently under the "annual accounting concept", the same rule is not applicable to the determination of capital costs which must be recovered from gross receipts. This Court has so held in *Burnet* v. *Sanford & Brooks Co.*, 282 U.S. 359, and in *Dobson* v. *Commissioner*, 320 U.S. 489. In the latter case, this Court pointed out that the annual accounting concept cannot be applied in a case involving a recovery of cost, because the constitutional principle overrides tax accounting rules. See also *California and Hawaiian Sugar Refining Corporation, Limited* v. *United States*, 311 F.2d 235 (Ct. Cl.), relying on this Court's holdings.

Respondent states that ". . . there has been consistent and uniform application by the lower courts of the doctrine of taxability of unrestricted prepaid receipts." At the time that respondent's memorandum was submitted, this was a partial truth obtaining only where the case involved service income, or where the constitutional question was not put in issue. However, other cases have recognized the necessity to offset gross receipts by capital costs to obtain gross income.[5] And, there is absolute in-

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[4] It is in the nature of the cemetery business that markers may not be delivered until many years in the future. Because all of the petitioner's income is prepaid, it will have a deduction in some future year which will be wasted, *i.e.*, a net operating loss which cannot be carried back to the years in which receipt occurred.

[5] Petition for Writ, pp. 4, 5.

consistency between the rule permitting real estate developers to subtract estimated development costs in obtaining gross income, and the contrary rule applied to cemeteries.[6]

Reference is made by respondent to legislative history of Section 452 of the Internal Revenue Code of 1954, which dealt with tax accounting for prepaid income. The quotation (Memorandum in Opposition, p. 4) is taken out of context and emphasis is supplied where language was used quite loosely. If the issue were being argued on the merits, the petitioner would show that the reference to payments for "goods" dealt with leases and other cases not involving recovery of costs. It can also be shown that pre-existing law was not as urged by the respondent. At this time, the petitioner need only point out that questions of constitutional law are not normally decided by reference to legislative history. If the tax imposed on petitioner represents an improper tax on gross receipts, no statute or statement of Congressional intent is relevant.

There are two recent developments in the area of tax law involved here. The Seventh Circuit has held as open, reversing the Tax Court, the possibility that prepaid revenues from ticket sales may be deferred.[7] Therefore, the respondent's claim that there is no conflict is not correct, even as to the question of timing. Second, counsel for petitioner has learned that agents of the Internal Revenue Service are proposing deficiencies in a number of cases where retail establishments have received advance payments as "deposits" or have what is known as "lay away" plans. As a result, there are now or shortly will be a substantial number of cases pending for administrative review within the Internal Revenue Service on the precise issue raised in this case. By granting the writ of cer-

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[6] *Ibid.* p. 4.

[7] *Artnell Company* v. *Commissioner*, No. 16586, — F.2d —, (CA 7, September 19, 1968), reversing and remanding 48 T.C. 411.

tiorari and hearing argument, this Court will provide a firm ruling and avoid multiple litigation on a point which is now ripe for hearing.

None of the respondent's arguments opposing the writ of certiorari is valid.

The petition for writ of certiorari should be granted.

Respectfully submitted,

JACQUIN D. BIERMAN
Attorney for Petitioner